

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
(Mather and Elk Grove, California)

NORTHERN VALLEY EXPRESS, LLC 1/

Employer

and

TEAMSTERS LOCAL 150, AFFILIATED WITH THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS 2/

Petitioner

Case 20-RC-18016

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds: 3/

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 4/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 5/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9 (c)(1) and Section 2(6) and (7) of the Act. 6/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 7/

All full-time and regular part-time drivers and dock workers employed by the Employer at its Mather and Elk Grove, California facilities; excluding all other employees, guards and supervisors 8/ as defined in the Act.

**DIRECTION OF ELECTION 9/**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees

who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **TEAMSTERS LOCAL 150, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.**

#### **LIST OF VOTERS**

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB. Wyman-Gordan Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before **March 18, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by **March 25, 2005**.

Dated March 11, 2005

at San Francisco, California

/s/ Robert H. Miller  
Regional Director, Region 20

- 1/ The Employer's name appears as amended at the hearing.
- 2/ The Petitioner's name appears as amended at the hearing.
- 3/ I hereby include in the record, as Board Exhibit 5, my Order Denying Request to Reopen Record, dated February 18, 2005. By my Order, the Employer's facsimile letter dated February 11, 2005, is included in the record as Board Exhibit 3, and the Petitioner's Opposition is included as Board Exhibit 4. In addition, my Order included in the record, as Employer Exhibits 2(a) and (b), two documents submitted by the Employer after the hearing closed. This was done pursuant to an agreement between the parties entered into on the record allowing the post-hearing submission of such documents in response to Petitioner's subpoena duces tecum. No party has objected to the inclusion of these two documents (i.e., Employer Exhibits 2(a) and (b)) in the record.

In its Motion, the Petitioner requested that I strike the Employer's letter of February 11, 2005, on the basis that it included post-hearing argument, which was made after the parties had agreed at the hearing to waive the filing of briefs. In my Order, I declined to grant Petitioner's motion to strike in this regard. I did so because the Employer's letter constituted a pleading in this case, necessitating its inclusion in the record for review purposes. However, I have not considered the Employer's arguments made in its February 11, 2005, letter in reaching my decision in this matter.

- 4/ The record reflects that the Employer, a California limited liability corporation with places of business located in Mather and Elk Grove, California, is engaged in the business of transporting freight for DHL Corporation. The parties stipulated, and I find, that during the calendar year ending December 31, 2004, the Employer provided services valued in excess of \$50,000 to DHL, which meets the Board's direct inflow and direct outflow jurisdictional standards. Based on the record evidence and the parties' stipulation to such facts, I find that the Employer is engaged in commerce and that it will effectuate the policies of the Act to assert jurisdiction in this matter.
- 5/ The parties stipulated, and I find, that there is no contract bar to this petition.
- 6/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
- 7/ By its amended petition, the Petitioner seeks to represent a unit comprised of all package car drivers, deliverers and dock workers employed by the Employer at its Mather Field facility located at Mather, California; excluding all other employees, guards and supervisors as defined in the Act. The petitioned-for unit consists of approximately 19 employees.

Contrary to the Petitioner, the Employer contends that the only appropriate unit is one that also includes approximately five dock workers employed at its Elk Grove, California facility. The Elk Grove facility is located inside the Apple Computer complex about 25 miles from the Mather facility. For the reasons discussed below, I find that the unit must include employees at both facilities.

The Employer's Management. The record reflects that the Employer's sole owner is Jeff Spencer, who has owned and operated the business for approximately ten years. There is no evidence that the Employer has any facilities other than the Elk Grove and Mather facilities.

The Employer leases its employees from a separate company called Westaff, which also handles the Employer's payroll and benefits processing, as well as garnishment and unemployment issues. As discussed below, Westaff is not otherwise involved in managing the Employer's workforce and no party contends that Westaff is a joint employer of the employees at issue herein. All employees at both facilities are listed as "driver/messengers," on the same Westaff payroll. However, the record reflects that the dock worker employees do not drive routes for the Employer. All personnel files and accounting records for both locations are maintained both at Westaff's office and at Spencer's home.

The record reflects that Spencer makes all personnel and labor relations policies for the Employer, including hiring, firing, disciplinary and pay raise decisions for all employees at both facilities. Spencer also handles the leasing of vehicles and the procurement of supplies for both facilities. The Employer has no employee handbook setting forth rules and regulations governing its employees, although Spencer testified that the Employer and all of its employees are subject to certain requirements imposed by the Employer's contracts with DHL. The Employer has no formal appraisal system. In this regard, Spencer testified that he works at the Mather facility on a daily basis and knows first-hand about the attendance, service and attitude problems of employees at that location. He testified that most of his communications with employees at the Mather facility are done in person and not by written memoranda.

Spencer visits the Elk Grove facility a couple of times each week. According to Spencer, the individual in charge at the Elk Grove facility is Charles Robinson, who generally handles matters at that facility on his own, and independently schedules the employees there.

Wage Rates, Benefits, Uniforms & Equipment. All employees at both facilities are hourly paid, except for Steve Chambers, who is paid a salary. Chambers is a floater driver whom the Employer contends is a statutory supervisor. Employees at the Mather facility do not punch a time clock and the record

does not disclose whether Elk Grove facility employees do so. All employees at both facilities have the same starting pay rate of \$8 an hour, and all employees receive the same fringe benefits, which include medical and dental benefits. All hourly employees are eligible for overtime pay. All employees at both facilities wear either DHL or Airborne Express uniforms. In this regard, the record discloses that the Employer's agreement with DHL requires the Employer to use DHL uniforms and DHL recently acquired Airborne Express, which has caused the Employer to be in a state of transition between using Airborne Express and DHL uniforms and other equipment. All drivers, except Marcus Crawford, drive vehicles which have DHL logos. All drivers use scanners, which are used to read bar codes on packages, and which serve as communication devices that enable the Employer and/or DHL's dispatchers to notify drivers when packages are ready for pick up. Employees also use dollies to move freight in performing their jobs.

The record discloses no history of collective bargaining at either of the Employer's facilities.

The Employer's Operation. The Employer is one of several contractors who have agreements with DHL to deliver packages to customers within certain designated zip codes. The Employer's contract is to deliver packages for DHL to the South Sacramento and Elk Grove areas. The record does not include the general cartage contract between the Employer and DHL, however, it does contain two schedules from the DHL contracts for calendar years 2002 and 2003, which show that the Employer delivers packages to such DHL customers as Sears, All Data, Airborne@Home and Technicolor. The schedule for calendar year 2003 shows that the Employer is also contracted to make deliveries to Apple Computer. Apple is one of DHL's largest customers in the Sacramento/Elk Grove area. The Employer's Elk Grove operation is located within Apple's Elk Grove complex, and is responsible for handling dock work for freight coming into and going out of Apple's replacement parts section. The record reflects that the dock workers at the Employer's Elk Grove operation handle only Apple freight, and that the dock workers at that facility do not drive delivery routes.

The Mather Facility As indicated above, the Employer's Mather facility is located at Mather Field (formerly Mather Air Force Base), and all persons who enter the Mather facility must wear security badges. The Employer shares this facility with other DHL contractors. DHL flies freight into and out of Mather Field. Most of the freight coming into the facility is transported by conveyor belt to a central sorting facility where it is sorted for ground delivery by the Employer and other contractors.

The Employer employs 17 drivers and two dock workers at the Mather facility. Fourteen of the drivers have assigned delivery routes and three drivers,

including Steve Chambers, Terry Ronzone and Drew --, whose last name is not disclosed in the record, work as floater drivers, handling the routes of drivers who are ill or on vacation.

Almost all of the drivers at the Mather facility work Monday through Friday, from 7 a.m. to 5:00 or 5:30 p.m. One driver comes to work at 6 a.m. and sorts envelopes and scans inbound freight until he departs on his regular daily delivery route. Two drivers, Jeff Mix and Gabriel Woods, regularly work on Saturdays. Driver Laurie House, whom the Employer contends is a statutory supervisor, also sometimes works on Saturdays.

Each of the Mather drivers drives the same vehicle every day. In the mornings, the drivers park their vehicles next to the conveyor belt. One of the Employer's dock workers offloads, weighs and scans the bar codes on the packages moving along the belt, and the drivers re-scan the packages and load them onto their vehicles. Between 8:30 a.m. and 9 a.m., the drivers leave the Mather facility to make their deliveries and pick ups. Deliveries are usually made in the morning and pick ups are made in the afternoon. The drivers' scanners have a text message system that enables the drivers to determine when packages are ready for pick up. A DHL dispatcher, who is not an employee of the Employer, dispatches pick up orders to the Employer's drivers. The drivers are away from the facility from about 9 a.m. each day until they return from their delivery routes at about 4:30 p.m. When they return, they unload their vehicles, scan their packages, load the packages that they have picked up during the day onto the conveyor belt, park their vehicles in assigned spots, take returned packages to a cage area in the Employer's facility, and check out for the day with Dock Worker Sue King in the Employer's office. In order to check the drivers out, King runs a computer print out showing all pick ups and deliveries made by the driver during the day. King and the driver then review the print out to determine if there are any discrepancies or unaccounted for packages. When this process is completed, King clears the driver to leave for the day.

King and the other dock worker open and close the Employer's facility and work split shifts for two hours in the morning and three hours in the afternoon. One of the dock workers generally works on the dock in the morning, offloading, scanning and weighing packages, while the other works in the office performing administrative functions. In the evening, one reweighs outbound packages and loads them into containers, while the other, Sue King, clears the drivers, as described above. Neither dock worker drives a route. Owner Spencer testified that the dock workers at the Mather and Elk Grove facilities perform similar work.

Apple. As indicated above, one of DHL's largest customers in the Elk Grove area is Apple, which has a large complex in Elk Grove, where the Employer's

operation is located. On a daily basis, two trucks transport freight from Mather Field to Apple. One of these trucks is a big rig, driven by employees of a DHL contractor other than the Employer. The big rig transports Apple products that arrive at Mather Field in containers. At Mather Field, these containers are unloaded from the DHL plane and placed directly onto the big rig by employees of another contractor, and do not go through the sorting center. At the Apple complex, this big rig delivers the freight to the Employer's operation where the Employer's dock workers unload the containers.

Non-containerized Apple freight is processed through the Mather Field sorting center, and transported to the Apple facility each day by Employer Driver Marcus Crawford, who is employed at the Employer's Mather facility. Such freight consists of nonworking or damaged Apple products. Crawford delivers them and also picks up freight from the Employer's Elk Grove facility, and he also makes deliveries and/or pick ups at three other locations within the Apple complex. Crawford does not work alongside the Employer's employees at Elk Grove when he makes his deliveries and pickups. Rather, he returns to the Mather facility after completing his delivery route as do all Mather drivers. Employees at the Employer's Elk Grove operation unload the freight transported by Crawford and also the containers transported by another contractor from Mather Field. The record reflects that Mather Driver David Mix has substituted on Crawford's route on about five to eight occasions in the year preceding the hearing. Mix testified that when he handled this route, he never saw any employees that he could identify as employees of the Employer or who wore DHL or Airborne Express uniforms.

The Elk Grove Facility. Entry into the Apple Complex where the Employer's Elk Grove operation is located requires a security badge. At the Elk Grove facility, the Employer employs five dock workers, including David Chisom, Sydney Hopkins, Clyde West, Michael Bailey and Charles Robinson, who work at two buildings within the Apple Complex. As indicated above, the Employer asserts that Charles Robinson is a statutory supervisor who should be excluded from the unit. Robinson works only at the Elk Grove facility and has no authority over the Mather facility employees or its operation. As indicated above, Owner Spencer spends most of his time at the Mather facility but he also visits the Employer's operations at the Apple Complex about twice a week. Spencer testified generally that Robinson runs the Elk Grove operation and independently schedules employees at that location. Robinson also apparently performs dock work as do the other employees, but the record does not otherwise disclose how his duties or working conditions differ from those of the other dock workers.

At the Elk Grove facility, the Employer's dock workers receive the damaged equipment and Apple employees pull replacement parts from it and the

Employer's dock workers process, count and load it onto trucks to be transported elsewhere. The Employer's dock workers at Elk Grove handle only Apple freight. None of the Employer's employees at Elk Grove drive delivery routes. However, Dock Worker Sydney Hopkins occasionally delivers or returns packages that have been misdirected to the Employer's facility.

Temporary Transfers. The record reflects that the Employer generally does not temporarily transfer Mather facility employees to work at the Elk Grove facility in order to fill in for the dock workers there. According to Spencer, the drivers at Mather have their own routes to handle and cannot be spared to work at the other location. However, Spencer testified that he, Steve Chambers and Laurie House had sometimes substituted for employees at the Elk Grove facility.

The record also reflects that the Employer does not transfer employees from its Elk Grove operation to fill in for absent employees at the Mather facility. In this regard, Owner Spencer testified that with one exception, the Elk Grove dock workers are not trained to handle the delivery routes of the Mather drivers. The one exception, as discussed below, is Clyde West, a former Mather driver who lost his license and was transferred by the Employer to the Elk Grove facility to work as a dock worker. Although West is a trained delivery driver, he cannot perform driving duties for the Employer until he regains his drivers' license, and thus cannot substitute for absent Mather facility drivers. According to Spencer, two weeks are required to train a new driver to handle a delivery route.

Contacts Between Employees of the Two Facilities. As noted above, Mather driver Crawford makes a daily delivery and pickup of freight at the Elk Grove facility, but does not perform dock work there. Elk Grove Dock Worker Sydney Hopkins drives to the Mather facility on Fridays to pick up the payroll and DHL supplies for the Elk Grove facility. If Hopkins is absent, Mather Driver Crawford transports the payroll and supplies from the Mather facility to the Elk Grove facility. As indicated above, Owner Spencer and Drivers Laurie House and Steve Chambers have substituted for Elk Grove dock workers on some occasions. There is no evidence that the Employer has conducted any training sessions or meetings or has held any social functions attended by employees from both facilities.

Permanent Transfers. With regard to the permanent transfer of employees between the Mather and Elk Grove facilities, the record discloses that Elk Grove Dock Worker Clyde West worked as a driver at the Mather facility for about a year before losing his drivers' license. He was then transferred by the Employer to work at the Elk Grove facility about 18 months before the hearing. According to Owner Spencer, West cannot return to work at the



Mather facility until he regains his drivers' license. Mather facility driver Mark Tate is the brother-in-law of West. Tate testified that he had never driven to the Elk Grove facility and West had not worked at the Mather facility since transferring to the Elk Grove facility. The record also reflects that Elk Grove Dock Worker Hopkins formerly worked as a dock worker at the Mather facility. Hopkins transferred to the Elk Grove facility about three years before the hearing when the Employer first obtained the DHL contract to perform work at that location.

Analysis. As indicated above, the Petitioner seeks to represent a unit comprised of the drivers and dock workers at the Employer's Mather facility while the Employer contends that in order to be an appropriate unit, the unit must also include employees at its Elk Grove facility. In *Barlett Collins Co.*, 334 NLRB 484 (2001), the Board described its policy for determining appropriate units as follows:

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties.

As a general rule, a single-plant unit is presumptively appropriate, unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated that it has lost its separate identity. *J&L Plate, Inc.*, 310 NLRB 429 (1993). To determine whether the presumption has been rebutted, the Board considers such factors as: centralized control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; geographic proximity; and bargaining history, if any exists. *New Britain Transportation Co.*, 330 NLRB 397 (1999). Furthermore, "the party seeking to overcome the single-site presumption must show that the day-to-day interests of the employees at the sought locations have merged with those employees of the other locations." *Renzetti's Market, Inc.*, 238 NLRB 174, 175 (1978). The Board will find that the single facility presumption has been rebutted if there is evidence of a little local autonomy; centralized control over operations, personnel functions and labor relations; common supervision; regular and substantial interchange of drivers between facilities; permanent transfers; common employee skills; common benefits, holidays, and employee policies. The Board also considers bargaining history and the size of the workforce at each facility. See *Waste Management of Washington, Inc. d/b/a Waste Management Northwest*, 331 NLRB 309

(2000); *Novato Disposal Services, Inc.*, 328 NLRB 820 (1999); *R&D Trucking*, 327 NLRB 531 (1999).

Upon careful consideration of the facts in this case under the foregoing standards, I find that the Employer has rebutted the single-facility presumption. The record shows that the Employer's operation is small, employing a total of only about 24 employees at both locations. The record establishes a high degree of centralized control over daily operations and labor relations. The Employer is solely owned and managed by Spencer, who controls all personnel and labor relations policies and decision-making, with the exception of some scheduling decisions. Thus, Spencer controls hiring, firing, disciplining and pay rates for all employees. All employees at both locations are governed by the same work rules, carried on the same payroll, paid on the same pay day, paid at the same starting wage rate, and offered the same fringe benefits by the Employer. Spencer also procures the equipment and supplies for both facilities.

The record also shows a high degree of functional integration between the two facilities. Both facilities operate to fulfill the terms of the Employer's contract with DHL to deliver and pick up packages for DHL customers and to perform the associated dock work for such delivery services. Thus, on a daily basis, Mather Driver Crawford delivers the damaged Apple computers that are unloaded, processed and re-loaded for shipment by the Employer's Elk Grove dock workers. Although there is minimal evidence of temporary interchange between employees of the two facilities, the record shows that such interchange does occur, and given the small size of the Employer's workforce, I do not consider it insignificant. Furthermore, two employees have permanently transferred between these facilities. In addition, the record shows that there are regular contacts between employees of the two facilities when Crawford makes his daily deliveries to the Elk Grove facility and when Elk Grove Dock Worker Sydney Hopkins drives to the Mather facility on Fridays to pick up the payroll and supplies for the Elk Grove facility. Moreover, the work of the Elk Grove dock workers is similar to that of the dock workers included in the petitioned-for unit at the Mather facility.

The small size of the Employer's workforce, which is 19 employees at the Mather facility and only five at the Elk Grove facility, also supports my conclusion that employees at both facilities should be included in the same unit.

I have considered the 25 mile distance between the two facilities but do not find that it overcomes the evidence of centralized control, functional integration and interchange in the instant case.

Finally, I have considered that there is no history of collective bargaining supporting a single facility or a multi-facility unit.

With regard to the issue of local autonomy and whether there is separate or common immediate supervision of employees at these two facilities, as discussed below, I have decided to vote Steve Chambers, Laurie House and Charles Robinson subject to challenge because of the lack of sufficient evidence in the record regarding the authority of these three individuals to enable me to determine whether they are supervisors under Section 2(11) of the Act. However, even assuming that they are found to be statutory supervisors, my decision regarding the scope of the unit in this case would be the same. Thus, the evidence herein clearly establishes a high degree of centralized managerial control by Owner Spencer over decision-making on all labor policy and personnel matters for all employees at both facilities, and strongly supports my conclusion that the single facility presumption has been rebutted in this case.

In sum, given the high degree of centralized control over operations, personnel functions and labor relations; common terms of employment; significant evidence of functional integration and interchange; and the common skills of dock workers in the petitioned-for unit and at the Elk Grove facility, I find that the petitioned-for unit must include the Elk Grove dock workers in order to be an appropriate unit.

- 8/ The Employer contends that Steve Chambers, Laurie House and Charles Robinson are statutory supervisors who should be excluded from the unit. In the alternative, the Employer asserts that they should all be found to have the same status. The record does not clearly reflect whether the Employer's position in this regard is based on its view that all three individuals possess the same level of authority. While the Petitioner takes no position on Robinson, and was willing to stipulate as to Chambers' status as a statutory supervisor, it contends that House is not a statutory supervisor and should be included in the unit.

Steve Chambers. Steve Chambers is salaried and works at the Employer's Mather facility as a full-time floater driver. The record does not disclose his salary. He apparently receives the same fringe benefits as other employees. The record reflects that in the past, Chambers has typically worked three or four days each week as a floater driver, but since Christmas 2004, he has worked full time in that capacity. Owner Spencer testified that Chambers is the main supervisor at the Mather facility and that he schedules when drivers come to work and who will work on a particular day. However, in this regard it appears from the record that 14 of the 19 drivers at Mather have set delivery routes necessitating their reporting to work at the same time each day, Monday through Friday, and making their deliveries, and then returning to the

facility and checking out at about the same time each day. The Employer also has two drivers who are apparently regularly assigned to drive on Saturdays. There are no concrete examples of the kind of scheduling decisions Chambers makes on a regular basis or any other type of decisions that he makes involving other employees. Chambers is not present for the sorting and loading process done by drivers each morning, which is directed by Owner Spencer. Chambers arrives after this process is completed and then departs the facility in order to handle his own deliveries. Chambers returns from his route after other drivers have usually left work for the day. After he returns to the facility, the only work that the record reflects that he does is assisting Dock Worker Sue King in dealing with manifests.

Spencer's testimony is to the effect that he is present at the Mather facility every day and involved in running the operation and all personnel decisions that are made. Spencer testified that years ago, when his operation was much larger, Chambers used to be involved in the hiring process, but that Chambers had not been involved in hiring or firing decisions for the past two years. With regard to disciplining employees, Spencer testified that Chambers has the authority to discipline employees and give them a warning if they are late, but that Chambers usually brings such matters to Spencer's attention and Spencer handles them. As indicated above, Spencer testified that he is the one who makes all final disciplinary, termination and pay rate decisions for the Employer. There is no evidence that Chambers has made any effective recommendations to Spencer involving any personnel matters. The record reflects that most of the drivers have set routes and the same routine each day and know what they are supposed to do, so their need for direction is minimal. The record does not indicate whether Chambers handles other administrative functions for the Employer. Nor does it contain any evidence regarding whether and/or how often he may substitute for Spencer.

Laurie House. Mather Facility Driver Laurie House is a full-time driver who is hourly paid and receives the same fringe benefits as other employees. Spencer testified that House is paid a higher wage as a supervisor, but the record does not disclose her wage rate. The record does show that she is paid overtime as are the other hourly paid drivers. She is listed on the payroll as a driver/messenger, as are all other employees, including Chambers and Robinson. Prior to December 2004, House was a floater driver. During the Christmas season in 2004, House was handling the route of a driver who had left his job with the Employer. Then, in late December 2004, House told Spencer that she wanted to resign from her position as a supervisor and become a regular route driver. Spencer testified that he told House that he would keep her on the delivery route she was working "for now." Spencer then hired Driver Terry Ronzone to fill the floater position that House had

previously held. Since late December 2004, House has continued to work as a full-time route driver.

The record shows that House had also worked on Saturdays when one of the regular Saturday drivers was unavailable. However, the record does not show whether or how often House has worked on Saturdays since her conversation with Spencer in late December 2004.

According to Spencer, House has the authority to schedule replacement drivers on Saturdays. The record shows that the Employer has two regular drivers who handle Saturday work. However, Spencer testified that if another driver wanted to work on a Saturday to earn overtime, House has the authority to decide whether to fit him into the schedule. Spencer further testified that House opens the facility on weekdays and on Saturdays, and has keys to Spencer's office. She also helps to ensure that the morning sorting is done properly.

The record contains not specific examples to illustrate House's authority since she resigned from her former position in December 2004.

Spencer testified that before House resigned her supervisory position in December 2004, House and he had discussed the chronic tardiness of an employee and Spencer had verbally warned the employee a few times to stop coming in late. Then in approximately October 2004, House had recommended, and she and Spencer had agreed, that if the employee came in late again, House would send him home and handle his delivery route herself. According to Spencer, she did so on two or three subsequent occasions. Spencer's testimony indicates that House's recommendation with regard to this employee was in accord with a policy that had been followed by the Employer for dealing with tardy employees. Spencer also testified that like Chambers, House has the authority to discipline employees and give them a warning if they are late but that she usually brings the matter to Spencer and that he (Spencer) makes all final disciplinary decisions. The record includes no specific examples or concrete evidence of warnings given to employees by House other than the incident involving the tardy driver. Nor is there evidence of House's involvement in any other type of disciplinary matter.

Charles Robinson. Spencer testified that Robinson is in charge at the Elk Grove facility, and that he (Spencer) only visits that facility twice a week and spends little time on the dock. According to Spencer, Robinson handles all of the receiving for the inbound freight delivered by the big rig and schedules the employees at that facility on his own. The record reflects that Robinson works from about 7 a.m. to 3 p.m. and the other dock workers work from about 9 a.m. to 5 p.m. The record does not disclose any further details about

Robinson's job duties except that he is hourly paid and eligible for overtime pay, and receives the same fringe benefits as other employees.

Analysis. The Employer contends that Chambers, House and Robinson are statutory supervisors. The Petitioner asserts that House is not a statutory supervisor and that Chambers is a statutory supervisor, but did not taken a position regarding Robinson's status as a statutory supervisor. The Employer also argues that my finding regarding the status of each of these individuals should be the same. For the reasons discussed below, I find that each of these individuals should be voted subject to challenge.

The term "supervisor" is defined in Section 2(11) of the Act as:

"[A]ny individual having authority, in the interest of the Employer-Petitioner, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). An individual who exercises some "supervisory authority" only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id.* Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971); *Waterbed World*, 286 NLRB 425, 426 (1987).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers*

*v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). It is well established that mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Although a supervisor may have “potential powers . . . theoretical or paper power will not suffice. Tables of organization and job descriptions to do not vest powers.” *Oil Workers v. NLRB*, *supra*, at 243. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 969 (4th Cir. 1980).

Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

The record shows that House spends most of her time driving routes as do other employees in the unit and she is hourly paid at an undisclosed rate and receives overtime and the same benefits as other employees. She works at the facility where Owner Spencer spends most of his time directing the operation and making personnel decisions. The record shows that she resigned from her former position in late December 2004, and is currently a full-time driver. Owner Spencer testified that she still has authority to schedule employees on Saturdays, but the record does not provide sufficient evidence to enable me to determine how frequently she exercises this authority and whether it entails any real discretion or independent judgment on her part. Accordingly, I have decided to allow her to vote subject to challenge.

With regard to Chambers and Robinson, the record contains little evidence to enable a determination as to whether they are statutory supervisors. Thus, Spencer testified generally that both men schedule employees at their respective facilities, and that Spencer spends most of his time at the Mather facility where Chambers works and less time at the Elk Grove facility where Robinson works. Spencer testified generally that Robinson handles everything pretty much on his own at the Elk Grove facility but that Spencer visits that facility twice a week. In addition, the record shows that other employees view Chambers as a supervisor and that he is salaried, although he spends most of his time driving a route. Finally, the record shows that when the Employer’s operation was much larger a few years ago, Chambers was involved in hiring and firing decisions but he is no longer involved in making them. In sum, as with House, the record does not disclose sufficient evidence from which I can determine whether either man uses independent judgment in making scheduling decisions or in carrying out any other responsibilities or whether any decision making they do is simply of a routine nature. Accordingly, Chambers and Robinson will also be permitted to vote subject to challenge.

- 9/ It has been administratively determined that the Petitioner has an adequate showing of interest in the unit found appropriate herein. As the unit found appropriate is larger than that requested, and as the Petitioner has not indicated whether it would proceed to an election if I determined that the unit should include employees at both of the Employer's facilities, the Petitioner may withdraw its petition without prejudice by notice to the undersigned within 7 days from the date of this decision if it does not wish to proceed with an election.